

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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U.S. DISTRICT COURT
SAN JUAN, P.R.

DANIEL ROSADO, et. al.

Plaintiffs

v.

CIVIL NO. 98-1384 (DRD)

PUERTO RICO PEPSI COLA BOTTLING CO.

Defendants

REPORT AND RECOMMENDATION

Defendant, Pepsi Cola Puerto Rico Bottling Company ("PCPRBC"), has moved for partial summary judgment as to plaintiff's Third and Fourth Causes of Action. *See Motion For Partial Summary Judgment* (Docket No. 54).

The plaintiff, in turn, filed an opposition thereto (Docket No. 59). Reply and Sur-reply memoranda were subsequently filed by the parties (Docket Nos. 63 and 68, respectively). The matter was then referred to the undersigned for report and recommendation (Docket No. 69).

I. Local Rule 311.12

The Court's initial task when faced with summary judgment papers is to determine whether the parties have complied with Local Rule 311.12. Said Rule provides:

Upon any motion for summary judgment, there shall be served and filed annexed to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record.

All material facts set forth in the statement required to be served by the moving party shall be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

The papers opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific reference to the record. The statements referred to above shall be in addition to the material required by subdivisions (4), (5), and (6) of this Rule.

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3 The purpose of Local Rule 311.12 is to prevent the Court, when ruling upon a summary
 4 judgment motion, from having to ferret through the record in order to search for genuine issues of
 5 material fact, or, the lack thereof. See Rivera Vélez v. Puerto Rico Electric Power Authority, 170
 6 F. Supp. 2d 158, 162 (D.P.R. 2001) (Domínguez, J.). Rule 311.12's mandate is not a lax one;
 7 contrariwise, it is of the essence and requires strict compliance therewith, which a District Court
 8 cannot simply ignore based on leniency considerations. See Morales v. A. C. Orsleff's EFTE, 246
 9 F. 3d 32, 33 (1st Cir 2001) (noting that a party's failure to comply with Rule 311.12 will, where
 10 appropriate, be grounds for judgment against the party); Rivera Vélez, supra at 163 (admonishing
 this Magistrate-Judge to always require parties to comply with Rule 311.12).

11 At the outset in this case, the Court notes that PCPRBC has duly complied with Rule 311.12
 12 by filing, along with its summary judgment motion, its separate, short and concise statement of
 13 undisputed material facts in full observance with the first paragraph of said Rule.

14 Plaintiff, however, has not fully heeded Rule 311.12's strict mandate. The second paragraph
 15 of the Rule requires that plaintiff controvert all material facts set forth in PCPRBC's statement of
 16 uncontested facts. PCPRBC's statement of uncontested facts contains fifty four (54), separate, short
 17 and concise factual statements, each appropriately referenced to the record. See Docket No. 54.
 18 Plaintiff's counterstatement, in turn, contains only four (4) contested facts. See Docket No. 59.

19 The plaintiff's Rule 311.12 counterstatement only contradicts paragraphs 2, 4, 5 and 51 of
 20 PCPRBC's statement. Thus, pursuant to the second paragraph of Rule 311.12, paragraphs 1, 3, 6-
 21 50, and 52-54 of PCPRBC's statement of uncontested facts are deemed admitted for purposes of
 22 ruling on its motion for summary judgment.

23 II. Fed. R. Civ. P. 56(e)

24 Fed. R. Civ. P. 56(e) provides:

25 (e) **Form of Affidavits; Further Testimony; Defense Required.**
 26 Supporting and opposing affidavits shall be made on personal
 27 knowledge, shall set forth such facts as would be admissible in
 28 evidence, and shall show affirmatively that the affiant is competent
 to testify to the matters stated therein. Sworn or certified copies of
 all papers or parts thereof referred to in an affidavit shall be attached
 thereto or served therewith. The court may permit affidavits to be

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2 supplemented or opposed by depositions, answers to interrogatories,
 3 or further affidavits. When a motion for summary judgment is made
 4 and supported as provided in this rule, an adverse party may not rest
 5 upon the mere allegations or denials of the adverse party's pleading,
 6 but the adverse party's response, by affidavits or as otherwise
provided in this rule, must set forth specific facts showing that there
is a genuine issue of trial. If the adverse party does not so respond,
 summary judgment, if appropriate, shall be entered against the
 adverse party. (Emphasis added).

7 At the outset, the Court notes that paragraph 4 of plaintiff's statement of contested facts fails
 8 to comply with Rule 56(e). Said paragraph states "PCPRBC provided job outsourcing opportunities
 9 to some departing executives" and then makes reference to plaintiff's own affidavit, prepared to
 10 accompany his own 311.12 statement. However, the affidavit itself does not even mention evidence
 11 supportive of plaintiff's paragraph four which would be admissible into evidence at trial.
 12 Consequently, pursuant to Fed. R. Civ. P. 56(e) and Local Rule 311.12 paragraph 51 of PCPRBC's
 13 statement of uncontested facts must also be deemed admitted.

14 Paragraphs 1, 2 and 3 of plaintiff's statement of contested facts state the following:

- 15 1. Not all terms and conditions of [plaintiff's] employment contract
 16 with [PCPRBC] are included in the letters dated February 8, 1993
 and February 22, 1993 (references omitted).
- 17 2. [Plaintiff] signed two letters of understanding in June 1995 related to
 18 BAESA's employment (references omitted).
- 19 3. PCPRBC had additional moving responsibilities towards [plaintiff]
 than the ones included in the June 26, 1995 letter (reference omitted).

20 As stated earlier, these three paragraphs are intended to counter paragraphs 2, 4 and 5 of PCPRBC's
 21 statement of uncontested facts. The Court, however, fails to see how exactly plaintiffs' three
 22 counterstatements "set forth specific facts showing that there is a genuine issue for trial" as required
 23 by Fed. R. Civ. P. 56(e).

24 The only exhibit that presents specific facts countering paragraphs 2, 4 and 5 of PCPRBC's
 25 statement of uncontested facts is plaintiff's own affidavit which states that: (i) plaintiff was entitled
 26 to a severance payment (see ¶¶ 3, 4 and 5 of affidavit); (ii) plaintiff was excluded from PCPRBC's
 27 job-out placement program (see ¶ 7 of affidavit); and, (iii) plaintiff's Brazilian work visa was not
 28 obtained because of PCPRBC's fault (see ¶¶ 9, 10 and 11 of affidavit). The plaintiff's statements

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2 in his own affidavit, however, constitute inadmissible hearsay and/or are self-serving statements
3 lacking personal knowledge. Consequently, these statements cannot be used to counter PCPRBC's
4 statement of uncontested facts. See, e.g., Garside v. Osco Drug, Inc., 895 F. 2d 46, 50 (1st Cir.
5 1990)(holding that a party may not rely on hearsay to oppose a proper motion for summary
6 judgment); FDIC v. Roldán Fonseca, 795 F. 2d 1102, 1110 (1st Cir. 1986) (same); Smith v. Williams
7 Hospitality Mgmt. Corp., 950 F. Supp. 440, 444 (D.P.R. 1997) (same); Ponce Federal Bank, F.S.B.
8 v. The Vessel "Lady Abby", 780 F. Sup. 878, 881 (D.P.R. 1992) (same). See also, e.g., Santiago-
9 Ramos v. Centennial P. R. Wireless Corp., 217 F. 3d 46, 53 (1st Cir. 2000) (holding that affidavits
10 which do not provide specific factual information made on the basis of personal knowledge are
11 insufficient for opposing a proper summary judgment motion); Nereida-González v. Tirado-
12 Delgado, 990 F. 2d 701, 706 (1st Cir. 1993) (same); Martínez v. Junta de Planificación, 736 F. Supp.
13 413, 419 (D.P.R. 1990) (holding that "[a] genuine issue for trial precluding summary judgment is
14 not created by mere allegations in the pleadings or by surmise and conjecture on the part of litigants;
15 nor may summary judgment be defeated on gossamer threads of whimsy and speculation") (citations
16 omitted). Thus, the Court, for purposes of ruling upon the motion for partial summary judgment
17 before it must deem as admitted PCPRBC's statement of uncontested facts, as warranted by Fed.
18 R. Civ. P. 56(e) and Local Rule 311.12.

19 **III- Analysis**20 **(i) Uncontested Facts**

21 The facts considered by the Court are those contained in PCPRBC's statement of uncontested
22 facts (Docket No. 54). The most salient of these for purposes of the matter at hand are as follow.

23 In February 1993, PCPRBC made an employment offer to Daniel Rosado, the plaintiff,
24 which was accepted by Rosado in March, 1993. The terms and conditions of Rosado's employment
25 contract with PCPRBC are included in letter dated February 8, 1993, as modified by another letter
26 dated February 22, 1993, with the exception of the amount offered for housing. On July 1995,
27 Rosado began to work for BAESA, Florida Division ("BAESA"), pursuant to a Letter of
28 Understanding, and occupied the position of Business Development Director in Pepsi Cola

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2 Engarrafadora do Brazil ("Engarrafadora"), BAESA's Company in Brazil. Rosado signed a Letter
3 of Understanding in June 1995 that stated Rosado's terms and conditions of employment with
4 BAESA. In June 26, 1995, Rosado signed a document stating the agreed PCPRBC's moving
5 responsibilities towards Rosado.

6 Rosado and his family moved to Brazil in July 1995 in order for Rosado to occupy his
7 position in Engarrafadora. Rosado had been issued a temporary visa with multiple entries to work
8 in Brazil in May 19, 1995, which would be valid for a period of four years. Rosado's family,
9 composed of his wife Mary Rosado (co-plaintiff) and their three sons, entered and lived in Brazil
10 with a tourist visa until they were issued permanent visas. Rosado had been told that it would take
11 around six weeks in order for the Brazil Government to issue permanent visas. Counsel from the
12 Law firm of Demarest e Almeida were the Brazil local attorneys of Engarrafadora. Demarest e
13 Almeida were in charge of handling permanent visa applications and obtaining such visas from the
14 Brazilian Government for non-Brazilian management employees of Engarrafadora. Demarest e
15 Almeida specifically handled Rosado's and his family's permanent visa application. Brazilian
16 permanent visa applications had to be initiated by the Company in Brazil, via the Immigration
17 Division of the Ministry of Labor of Brazil. Rosado and his family did not receive their permanent
18 visa in a period of six weeks. In January 19, 1996 Rosado received a letter from Demarest e
19 Almeida explaining him the status of his and his family's visa applications. The January 19, 1996
20 letter from Demarest to Rosado stated that there had been a delay in obtaining the visas because
21 "...since there were some modifications in the rules of this Department [Labour of Ministry], new
22 documents have been requested for the issuance of visas, including an evidence of a connection
23 between the company in Brazil and other companies of the same group". On February 14, 1996, less
24 than a month after Rosado received the January 19, 1996 letter from Demarest e Almeida, Rosado
25 and his family were issued their Brazilian permanent visas. In late 1996, Rosado's employment in
26 BAESA was terminated. Following his termination, plaintiff was unable to obtain comparable
27 employment opportunities, following his move back to the United States.

28 PCPRBC has never offered its executives or its terminated executives a Job-Out-Placement

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2 Program. Rosado was never excluded from a Job-Out-Placement Program because PCPRBC never
3 had a Job-Out-Placement Program. Neither PCPRBC nor BAESA agreed to provide Rosado a Job-
4 Out-Placement Program in the event of a termination of employment.

5 **(ii) Applicable Law**

6 In his Third Cause of Action¹ plaintiff claims to have suffered damages caused by PCPRBC,
7 due to the latter's purposeful exclusion of plaintiff from a Job-Out Placement Program. This in turn,
8 caused him economic and professional hardships. Furthermore, plaintiff alleges that PCPRBC
9 purposely delayed his Brazilian visa application, causing him personal hardships while living in
10 Brazil. The plaintiff seeks compensation for these alleged damages pursuant to Article 1802 of the
11 Commonwealth's Civil Code, P. R. Laws Ann. tit. 31 § 5141.

12 In his Fourth Cause of Action² plaintiff alleges that because PCPRBC construed his
13 relocation to Brazil as a termination of employment, PCPRBC owes him a severance payment

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15 ¹ Plaintiff's Third Cause of Action reads as follows:

16 10. Defendant, purposely, excluded Plaintiff Daniel Rosado from its job-out-placement
17 program, available to its executives and which is customary within the Beverage Industry.
Said exclusion caused him severe hardships in gaining career enhancing employment and
caused considerable damages to Plaintiffs. These damages are estimated at \$500.00.

18 11. Defendant, in purposely depriving Plaintiff Rosado of the money which was rightfully
19 his and which has been referenced hereinbefore, caused the Plaintiff damages by not
20 allowing them to participate in various business opportunities because of their lack of
investment capital. These damages are estimated at \$1,000,000.

21 12. Defendant caused Plaintiffs, by purposely delaying their Visa application, to live
22 without any personal effects in Brazil, during eleven months, said actions caused Plaintiffs
23 considerable anguish distress, and emotional damages. These damages are estimated at
\$50,000.

24 13. Under Puerto Rico's Civil Code, 31 L.P.R.A. 5141, damages caused to a person by
25 another one's fault make the party causing the damages liable in tort and obliged to repair
the damage so done.

26 ² Plaintiff's Fourth Cause of Action reads as follows:

27 14. In the event that Defendant construes Plaintiff's relocation to Brazil as a termination,
28 then, it would also be responsible to Plaintiff Rosado for his severance pay amounting to
\$115,000 pursuant to plaintiff's Daniel Rosado employment contract with Defendant.

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2 pursuant to his employment contract.

3 In order for tort liability under Article 1802 of the Civil Code to attach based on non-
4 feasance grounds, such as alleged in the Complaint, it is imperative that the defendant owe the
5 plaintiff a legal duty to act. Absent such a duty, no liability arises. Sociedad de Gananciales v.
6 González Padín, 117 D.P.R. 94, 125 (1986). If a duty does exist, however, proximate cause between
7 the breach of said duty and the damages must also be present. Arroyo López v. Estado Libre
8 Asociado, 126 D.P.R. 682, 689 (1986). In the case at bar neither of these elements is present.

9 The delay in obtaining plaintiff's visas was the result of changes in Brazilian immigration
10 requirements. See Statement of Uncontested Facts at ¶¶ 16, 17 (Docket No. 54). Said delay is one
11 wholly attributable to the Brazilian Government bureaucracy, and cannot be attributed to PCPRBC,
12 which did not have the obligation to submit supporting documents not requested by immigration
13 authorities until the same were indeed requested.

14 Plaintiff's claim that PCPRBC excluded him from its Job-Out Placement Program is also
15 belied by the uncontested fact that PCPRBC never offered such program. See Statement of
16 Uncontested Facts at ¶¶ 51-53 (Docket No. 54).

17 In his Third Cause of Action plaintiff further claims that PCPRBC, by withholding money
18 which was due to him, caused plaintiff damages by not allowing him to participate in various
19 business opportunities because of his lack of investment capital. See Amended Complaint at ¶ 11
20 (Docket No. 22). However, as discussed previously, plaintiff has not adequately contested the
21 properly supported statements presented by PCPRBC at ¶¶ 20-44 of its statement of uncontested
22 facts (Docket No. 54). Therefore, this claim must also be summarily dismissed. The Court, in this
23 instance, however, notes that plaintiff in his surreply (Docket No. 68) has proffered facts and
24 submitted additional documentation to counter PCPRBC's statement of uncontested facts. Said
25 effort, however, does not procedurally comply with Local Rule 311.12 as a supplemental statement
26 of contested facts was not provided along with the surreply. See, e.g., Pagán de Jesús v. Toledo
27 Dávila, 184 F. R. D. 24, 26 (D.P.R. 1999) (Domínguez, J.) (requiring supplemental 311.12 statement
28 of facts to be filed along with motions filed subsequent to summary judgment and opposition

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2 thereto). More so, to allow plaintiff to supplement his 311.12 statement at this stage (his opposition
3 was filed on November 16, 2001) would unjustifiably prolong the present litigation.

4 Finally, in regards to plaintiff's Fourth Cause of Action, the Court also finds that there is no
5 genuine issue of material fact present. At ¶ 3 of his affidavit (exhibit 10 to Docket No. 59) plaintiff
6 states that *"PCPRBC was fully aware of its obligation to me of a severance payment equivalent to*
7 *one year's salary. This was discussed with several people. Mr. Charles Beach offered me a one*
8 *year severance payment verbally, through Mr. Lee Busch."* This statement, however, is
9 inadmissible hearsay, thus, insufficient to oppose a motion for summary judgment. See Garside,
10 supra; Fed. R. Civ. P. 56(e). The plaintiff has also offered as evidence of the existence of a
11 severance payment deal a questionnaire sent to him by PCPRBC's New York law firm, and in turn,
12 answered by him. See Exhibit 3 to Docket No. 59. Such statement, however, is self-serving and
13 was not approved by PCPRBC. More so, the questionnaire at issue was furnished to plaintiff for
14 use in connection with a Registration Statement covering a proposed sale of PCPRBC stock with
15 the SEC. Plaintiff was a company official required to fill out the same. Finally, while the record
16 does show that the terms and conditions of plaintiff's employment at PCPRBC at times were
17 modified, these changes were all made in writing. There is no admissible evidence in the record in
18 writing or otherwise suggesting that plaintiff became entitled to a severance payment.

19 **CONCLUSION**

20 Pursuant to Fed. R. Civ. P. 56(e) and Local Rule 311.12, the Court finds that there exist no
21 genuine issues of material fact in regard to plaintiff's Third and Fourth Causes of Action. Thus the
22 entry of summary judgment is warranted as to both claims pursuant to Fed. R. Civ. P. 56(c).

23 Notwithstanding the above, the plaintiff's First Cause of Action is not the object of the
24 present motion for summary judgment, and as such, survives for trial purposes. As the first Circuit
25 has fittingly described, at trial *"anything is possible"*. New Comm Wireless Services, Inc. v. Sprint
26 Com., Inc., 287 F. 3d 1, 14 (1st Cir. 2002). The Court, thus, urges the parties at this moment to
27 seriously consider settlement possibilities and request a settlement conference.

28 **WHEREFORE**, in light of the above, the Court hereby **RECOMMENDS** that PRPCBC's

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2 motion for partial summary judgment (Docket No. 54) be **GRANTED** in its entirety, and
3 accordingly, plaintiff's Third and Fourth Causes of Action be **DISMISSED**.

4 Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who
5 objects to this report and recommendation must file a written objection thereto with the Clerk of the
6 Court within ten (10) days of the party's receipt of this report and recommendation. The written
7 objections must specifically identify the portion of the recommendation, or report to which objection
8 is made and the basis for such objections. Failure to comply with this rule precludes further
9 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111
10 (1986); Davet v. Maccorone, 973 F.2d 22, 30/31 (1st Cir. 1992); Paterson-Leitch v. Massachusetts
11 Elec., 840 F.2d 985 (1st Cir. 1988); Borden v. Secretary of Health and Human Servs., 836 F.2d 4,
12 6 (1st Cir. 1987); Scott v. Schweiker, 720 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678
13 F.2d 376, 378-379 (1st Cir. 1982); Park Motor Mart, Inc. Ford Motor Co., 616 F.2d 603 (1st Cir.
14 1980).

15 **The Court Reminds the parties that Judge Domínguez will not grant any extensions of**
16 **time. See Order of August 5, 2002 (Docket No. 69).**

17 **SO RECOMMENDED.**

18 In San Juan, Puerto Rico, this 8th day of August, 2002.

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V. J. m. J.

GUSTAVO A. GELPI
United States Magistrate-Judge